



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 28 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

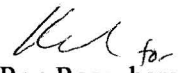
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a media consulting business. It seeks to permanently employ the beneficiary in the United States as a market research analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

As required by statute,² the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is August 18, 2011.³

The director's decision denying the petition concluded that the petitioner failed to establish its continuing ability to pay the proffered wage as of the priority date. The AAO will also consider whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.⁴

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

² *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

³ The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

⁵ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage stated on the labor certification is \$121,980 per year. The petitioner was incorporated in New York on May 27, 2011, less than three months before the priority date. On the petition, the petitioner claimed to have gross annual income of \$524,150 and to employ one worker. According to the tax return in the record, the petitioner is structured as an S corporation.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary did not claim to have worked for the petitioner. The record of proceeding contains no evidence that the petitioner has employed the beneficiary. Accordingly, the petitioner has not established that it paid the beneficiary an amount equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). The

petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). Accordingly any claim that the director should have added back depreciation to the petitioner's net income when determining its ability to pay the proffered wage is rejected.

The petitioner's 2011 federal income tax return states that the company had net income of (\$4,337).⁶ Therefore, for 2011, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Accordingly, any argument that the director should have considered the petitioner's total assets when determining its ability to pay the proffered wage is rejected.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's 2011 tax return states net current assets of (\$13,793).⁸ Accordingly, for 2011, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submits an unaudited financial statement for May 27, 2011 to April 30, 2012. However, the regulation at 8

⁶ The petitioner filed its tax returns using Form 1120S, U.S. Income Tax Return for an S Corporation. For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18. When the two numbers differ, the number reported on Schedule K is used for net income.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has only been in business since 2011 and claims to employ one employee. The petitioner has not established the existence of circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of whether the beneficiary will be replacing an outsourced service.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8

C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the petitioner failed to establish that the beneficiary possessed the required education and experience for the offered position as required by the terms of the labor certification.

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

- H.4. Education: Master's degree in marketing or related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: None permitted.
- H.8. Alternate combination of education and experience: Bachelor's degree and five years of experience in the offered position.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

Part K of ETA Form 9089 states that the beneficiary qualifies for the offered position based on a bachelor's degree in political science from [REDACTED] in Seoul, South Korea, and the following experience:

- Marketing Manager with [REDACTED] in New York from October 1, 2005.
- Marketing Manager with [REDACTED] in Seoul, South Korea from May 1, 2000 until March 31, 2004.
- Marketing Analyst with [REDACTED] in Seoul, South Korea from August 1, 1995 until April 30, 2000.

No other experience is listed.

Regarding the beneficiary's education, the record contains an evaluation of the beneficiary's education and experience prepared by [REDACTED] for [REDACTED].⁹ The evaluation concludes that the beneficiary's bachelor's degree is equivalent to a U.S. bachelor's degree in political science. The evaluation also concludes that the beneficiary's experience in marketing combined with this degree is equivalent to a U.S. bachelor's degree in marketing. The evaluation states that the experience-to-education equivalency is based on 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). However, this provision applies to the H-1B nonimmigrant visa classification and not to employment-based immigrant visa petitions.¹⁰

The labor certification states that the offered position requires a degree in marketing, and an alternative field of study is not permitted. As is discussed above, the beneficiary possesses a four-year bachelor's degree in political science. This degree is the foreign equivalent of a bachelor's degree in political science from an accredited college or university in the United States. But the beneficiary does not possess a degree in one of the required fields of study. Instead, the petitioner claims that the beneficiary has the equivalent of a marketing major based on her marketing experience.

However, the labor certification explicitly prohibits a degree in another field of study and does not permit a combination of education and experience to obtain the equivalent of the required field of study.

⁹ USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

¹⁰ This provision also does not apply because the evaluation does not address whether the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in any particular specialty occupation; or whether the beneficiary has recognition of expertise in any specialty, as evidenced by at least one of the specified types of documentation set forth in the regulation. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Further, there is no evidence that during the labor certification recruitment process, the petitioner informed U.S. workers that it would accept a major in a different field of study as long as the person had sufficient marketing experience.

Therefore, the beneficiary does not meet the minimum requirements of the offered position as set forth on the labor certification. The AAO cannot change the terms of the labor certification, which was prepared by the petitioner and was certified by the DOL following a period of recruitment for U.S. workers in accordance with 20 C.F.R. § 656.

In summary, the petitioner has established that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree from an accredited college or university. However, the degree is not in the field of marketing. Accordingly, the beneficiary does not meet the minimum educational requirements of the offered position as set forth on the labor certification.

Regarding the beneficiary's experience, the regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains the following evidence of the beneficiary's employment:

- Certificate of Employment from [REDACTED]. CEO [REDACTED]. The certificate states that the company employed the beneficiary as a Marketing Manager from August 1, 1995 until April 31, 2000. However, the letter is not on letterhead and does not describe the duties of the position performed. Further, the labor certification states that the beneficiary was employed as a Marketing Analyst by the company, not a Marketing Manager.¹¹
- Certificate of Career from [REDACTED]. The certificate states that the company employed the beneficiary as a Marketing Manager from May 29, 2000 until February 25, 2004. The letter describes the duties of the position performed. The certificate is not on letterhead and does not name the signatory. In addition, the stated dates of employment on the certificate are not consistent with the dates of employment on the labor certification. *See Matter of Ho*, 19 I&N Dec. at 591.
- Certificate of Career from [REDACTED]. The certificate states

¹¹ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

that the company has employed the beneficiary as a Marketing Manager from October 1, 2005 to the present. The letter describes the duties of the position performed. The certificate is not on letterhead and does not name the signatory.

Therefore, none of these documents meet the requirements for an experience letter set forth at 8 C.F.R. § 204.5(g)(1). In addition, there are inconsistencies between the beneficiary's employment letters and her employment history stated on the labor certification.¹²

Thus, the petitioner has not established that the beneficiary possesses the experience required to perform the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹² The record also contains a Form G-325A, Biographic Information submitted in connection with the beneficiary's adjustment application. The beneficiary does not list any occupation abroad on the section of the form requesting this information. See *Matter of Ho*, 19 I&N Dec. at 591.